# AVOIDING DISCIPLINARY COMPLAINTS

by

Charles Slanina

Client complaints may seem inevitable. The Professional Conduct Rules provide for near absolute immunity to clients who file complaints. There is no statute of limitations on the filing of complaints, and the current record holder is twenty-three years from offense to sanction. Also, the Office of Disciplinary Counsel is not limited to investigating and prosecuting client-filed complaints. They can also act on judicial referrals, informal peer reports, and any other conduct or misconduct that they discover by any other means, but practitioners can still take several steps to reduce their chances of receiving a complaint.

## Read the Rules

I have received too many calls from attorneys asking where they can obtain a copy of the Conduct Code. This both suggests that they have not recently read the Rules and also that they are unaware that the Conduct Code was replaced by the Rules of Professional Conduct approximately forty years ago. Attorneys, especially those that have been practicing for decades, often tell me that they operate under the "smell test" and assume that as long as it doesn't feel wrong or they are not stealing client funds, they should be fine. All attorneys should be aware that the practice of law is highly regulated. Many of the rules are technical, and ignorance of the Rules is unlikely to be a successful defense of a violation.

## Choose Your Clients Carefully

The last, best chance to avoid disciplinary complaints may be in the careful selection of clients. All attorneys need to develop a sixth sense when it comes to screening for troublesome clients. Many of my disciplinary defense clients tell me that they knew that this client was going to be trouble as soon as they met them. Learn to listen to that inner voice.

Develop your own list of red flags but consider including the following. Clients who have had multiple prior counsel should be avoided—especially if the client refuses to give you permission to talk to the prior counsel. Clients who come to you on the eve of the statute of limitations running are rarely a good risk. A client who suggests that there is a far-reaching conspiracy against them will inevitably conclude that you are part of that conspiracy, particularly if they do not achieve success as they define it. Clients who are unrealistic as to outcome or the

timing of their matters start the attorney-client relationship preordained to be unhappy with your representation and results. Generally, clients who are rude to you or your staff, are bullying and/or controlling may make that person difficult to work with. In the worst cases, the client is so off-putting that you may avoid that client and matter, exposing yourself to eventual claims of lack of diligence and communication. If a client presents with a strong need for unnecessary hand holding (for which they are rarely willing to pay), you should ask yourself whether you are willing to return what may be multiple calls a day. *See*, "Just Say No: Clients to Avoid" (*Ethically Speaking*, July 2003) and "More Clients to Avoid" (*Ethically Speaking*, January 2020).

**Screen Your Cases Carefully**

In addition to making sure you have the right client, you should make sure that you have taken on the right case. Is this a case that you are competent to handle or are willing to get competent? Does the case have enough value to merit the time and attention that your client is demanding? There is no sliding scale for effort based on value, and if you neglect a matter because you are pessimistic as to the outcome, you expose yourself to client dissatisfaction and a complaint.

Is the case meritorious? In addition to possible Rule 11 sanctions, dismissal, and reputational harm to your practice, there may also be disciplinary consequences if you are later determined to have assisted your client in a fraud or other wrongful conduct or even if you are simply found to have lacked diligence in screening the matter. Remember that you have a duty to the court and profession that may supersede your duty to the client.

Also be wary of serving as local counsel. Delaware courts have rejected the concept of "mere local counsel," finding that Delaware counsel in *pro hac vice* admissions are actually co-counsel, and Delaware counsel may have full liability for the merits of the pleadings that they file. *See* "*Pro Hac Vice* Admissions: Local Counsel on the Hook" (*Ethically Speaking*, March 2006).

Finally, be very wary of scams. Do you really believe that someone in China or Saudi Arabia heard of your fame as a Delaware Family Court practitioner and is asking you to file a debt collection or uranium mine enforcement action in Delaware for them? Falling for the lure of an exorbitant fee, you will inevitably be given a foreign check to deposit in your escrow account followed by an urgent request to disburse some or all of it as soon as possible—and before you

can discover that the check is a forgery. *See* "Are You Really Too Smart to be Scammed? Internet Scams and Attorney Trust Accounts" (*Ethically Speaking*, November 2008).

**Selectively Terminate Clients**

Rule 1.16 provides for permissive withdrawals from an attorney-client relationship. If a client or matter has slipped through your screening process, it's not too late. However, if you delay, you may find that your request to withdraw from matters already in litigation may be denied by the court.

**Don't Sue Clients to Collect Fees**

A suit to collect fees is almost always met by an answer and countersuit for malpractice and often a disciplinary complaint filed as leverage in defense. Instead, consider including an agreement to submit fee disputes to the Fee Dispute Committee of the Delaware State Bar Association. Requiring retainers and evergreen renewals of retainer balances can also avoid the need for collections. *See* "Fee Troubles" (*Ethically Speaking*, September 2022).

**Avoid Non-Practice-Related Disciplinary Conduct**

Remember that non-practice-related conduct may also be disciplinary. Rule 8.4 provides that criminal conduct committed outside of the practice of law may also result in sanctions. All felonies and any misdemeanors involving moral turpitude or violence may also be disciplinary.

**Bonus**

The above list, with the possible exception of the non-practice-related criminal conduct, also applies to avoiding malpractice claims.

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# FEE TROUBLES

by

Charles Slanina

Attorney fees can be as troublesome as they are necessary. Fee disputes with clients can lead to malpractice claims and disciplinary complaints. Several steps can be taken to avoid these issues.

**1. Always use fee agreements.**

Written fee agreements are required in contingency fee cases but strongly recommended in all others. Should the need arise to collect a fee from a client, the absence of a fee agreement will greatly hamper your efforts to get paid. Such agreements should be specific to the matter, describe the scope of the representation and the basis for billing. The client should be advised in the agreement if they will be responsible for costs, expenses, clerical and administrative work as well as who will be billing on their matter and the rates for any other attorneys or non-attorneys involved.

**2. The best measure to avoid fee disputes may be the selection of the client or matter.**

If a prospective client has had prior counsel, especially with a history of not paying those counsel, discretion should be exercised before undertaking the representation. Requiring the payment of a retainer can stress test the client's ability or willingness to pay. Also, clients rarely object to a notification that their retainer is being swept after work is performed in contrast with the reaction you may receive when the client is presented with an invoice for payment.

**3. Send the client a detailed statement of the work performed.**

Clients are more likely to pay an invoice describing with particularity all the services that you provided. Simple statements that you expended X number of hours performing "legal work" are much more likely to be questioned if not disputed. If litigation becomes necessary for collection, your chances of success in court are also enhanced by a detailed billing statement.

**4. Encourage payment by offering incentives.**

Effective attorney billing statements often include discounts if payment is made by a certain date. Late payments can also be discouraged by including a provision in the fee agreement for interest on late payments.

**5. Attorneys should avoid fee disputes or collections if at all possible for reasons discussed below.**

One way to avoid the need to litigate a claim for fees is to include a mandatory mediation provision in the fee agreement. The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 02-425 which condones binding arbitration and mediation provisions in attorney-client fee agreements. The Delaware State Bar Association's Fee Dispute Committee remains an underused resource providing free and binding mediation to resolve fee disputes.

**6. Litigation or collections should be used as a last resort.**

If you sue a client to collect a fee, you are very likely to be met with a counterclaim for malpractice and probably a disciplinary complaint regarding both the reasonableness of the fee as well as your performance in the representation itself. For this reason, many malpractice carriers will ask you how often you sue clients to collect fees If you do so routinely, it may result in denial of a policy. For the same reason, many firms have a policy or bylaw which requires an attorney to request approval from the executive committee before such collection suits are brought. Those committees typically evaluate the file to weigh whether the client has a viable counterclaim, whether there is a fee agreement and whether the bill is reasonable Firms also want to determine whether the fee is collectible as part of the process of determining whether the possibility of recovery is worth the risk of a counterclaim.

There is also the issue as to the firm's image and reputation. It can be viewed as unsavory to sue clients even without a counterclaim. It also makes is unlikely that the client will ever return to the firm should circumstances change and the client might bring a new and lucrative matter.

7. **As an alternative to suing to collect a fee, offer the client an accommodation by discounting the fee or agreeing to a payment schedule.**

Agreeing to a reduced fee or delayed payment can be far preferable to non-payment or litigation. When all else fails, the attorney's best recourse may be to write off the fee, especially where the client is judgment-proof as well as litigious enough to file counterclaims.

Fees: learn to live with them because you can't live without them.

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# EXIT STRATEGY

by

Charles Slanina

There are times when you are required to terminate an attorney-client relationship, and there are other situations in which it is just a good idea to do so. Generally, the professional responsibility obligations related to ending an attorney-client relationship are governed by Rule 1.16 of the Delaware Professional Conduct Rules: Declining or Terminating Representation. That Rule covers both mandatory and permissive withdrawals.

Attorneys are *required* to terminate the attorney-client relationship if continued representation would violate a Professional Conduct Rule; the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, or the attorney is discharged by the client.

Attorneys are *permitted* to withdraw if the termination can be accomplished without material adverse effect upon the client; the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent; the client has used the lawyer's services to commit a crime or fraud; the client insists on a course of action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; the client fails substantially to fulfill an obligation to the lawyer (this could include paying the lawyer or failing to meet the obligation to be truthful to the lawyer); or other good cause. This list is not exclusive, and a lawyer can withdraw for any other reason with some important caveats.

If the matter is already in litigation, it may be necessary to seek the leave of the court to withdraw. That leave may be withheld even if good cause exists for either a permissive or mandatory withdrawal if it would adversely affect the scheduling order or prejudice the rights of the opposing party. A motion to withdraw may also be denied if the movant is serving as "local

counsel," especially if the attorney seeking permission to withdraw moved the out-of-state counsel's admission *pro hac vice*. The court may be reluctant to grant the motion if withdrawal leaves out-of-state counsel stranded without the assistance or supervision of a Delaware attorney. A motion to withdraw must reflect both the client and the opposing counsel's position, but client consent is not required.

With regard to permissive withdrawals, best practices call for careful case and client screening. Avoiding bad cases and bad clients may be your best defense against disciplinary complaints and malpractice claims. Problem cases and clients may result in the attorney avoiding the client or a reluctance to work on the matter. This exposes the attorney to claims of lack of diligence, communication or competence. However, even experienced practitioners take on a case or client that they later regret. It is often said that ten percent of your clients will monopolize ninety percent of your time and cause a disproportionate amount of your anxiety. The solution is to discharge those clients and withdraw from those cases early, before withdrawal would be a hardship for the client or inconvenient for the court.

When leave of the court is required, it is always a question as to how much information an attorney can and should put in the motion to withdraw. Too little, the motion may not be granted. Too much may violate the attorney's duty to maintain the confidences of the client. Those duties survive the end of the relationship. Generally, the more serious the conduct—or misconduct—of the client, the "noisier" the withdrawal may be.

Except for the important crime fraud exceptions found in Rule 1.6, an attorney has a duty to maintain client confidences and should only include in the motion to withdraw the minimal amount of information to support the request. Instead of stating that the client failed to pay his legal fees, an attorney should reference the client's failure to meet his obligations to the attorney

or firm. Instead of stating that the client insists on a frivolous legal claim or repugnant course of action, the motion should cite a fundamental disagreement about the objectives of the litigation.

When the attorney-client relationship is terminated, the attorney is still entitled to pursue recovery of fees from the client. However, most experienced attorneys recognize that suing a client to collect fees is always a hazardous undertaking. Suites to collect fees are typically met with malpractice counterclaims. Many firms have a policy against suing clients to collect fees. Other firms require approval of the management committee which will only be granted after a careful file review to assess whether the amount of the fees is sufficient, collectability is likely and the absence of a viable malpractice claim warrant the risk of a counterclaim. While malpractice carriers don't routinely prohibit collections actions against clients or former clients, many carriers include a question on applications and renewal forms inquiring as to how often attorneys or firms have sued clients to collect fees.

When an attorney is replaced as counsel, successor counsel should be put on notice of any claim for past fees or future recoveries. Successor counsel have a recognized professional obligation to advise previous counsel of the recovery and to escrow the funds claimed by prior counsel.

Finally, attorneys have an obligation to cooperate with the former client and successor counsel after the relationship ends—even if the termination results from non-payment of legal fees. While assertion of a file lien to secure payment of fees is a tempting remedy, that remedy has significant limitations and is likely to be viewed unfavorably by the court and the Office of Disciplinary Counsel, if challenged. In conclusion, be selective about your cases and clients to make terminations infrequent. But, if an issue does arise, act early enough to keep it from being a serious problem.

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DISCIPLINARY LISTS: DO'S and DON'Ts

by

Charles Slanina

Even if your New Year's Resolutions have already been kept or forgotten, here's three lists to help guide you in 2017:

## How to Attract the Attention of ODC

**1. Don't return client calls.**

This remains the #1 disciplinary complaint, although it does not typically result in a disciplinary matter. However, if the Office of Disciplinary Counsel receives enough calls or complaints, it is almost certain to prompt additional concerns involving diligence, competency and general communication with clients which often leads to a Lawyers' Fund for Client Protection audit.

**2. Fail a Lawyers' Fund audit.**

Not all non-compliance results in a referral to ODC. However, if the non-compliance issues are numerous or serious (or both) and the efforts at remedial measures are lacking, the LFCP can and does refer audit reports to ODC. Historically, more attorneys are sanctioned for books and records issues than any other Professional Conduct Rules violations.

**3. Violate a Court Order/Obligation.**

While not as numerous as books and records violations, judicial referrals to ODC to attorney violations of court rules and obligations occur often.

**4. Sue a client to collect a fee.**

Almost guaranteed to result in a counterclaim alleging misconduct, malpractice or both. Consider using fee dispute mediation through the Delaware State Bar Association instead.

**5. Forget the Rules of Professional Conduct.**

Too many Respondents in disciplinary cases admit that they haven't reviewed the Rules since passing the Bar Exam and rely solely on the "smell test" to guide their practice.

## How Attorneys React to Complaints (Borrowed from the 7 Stages of Grief Process)

**1. Shock and Denial**

How can this happen to me? Don't they know my reputation? It happens. It happens to attorneys in some areas of practice (I'm talking to you Criminal Law and Domestic Relations practitioners!) more than others.

**2. Pain and Guilt**

Not always bad things, but don't let them drive you to rash behavior in responding to the complaint—or avoidance in failing to respond.

**3. Anger and Bargaining**

"How dare this client complain! He should be grateful. I want to sue for defamation." You can't. Complainants have immunity. Rule 8 of the Rules of Disciplinary Procedure.

"I'll refund your legal fees if you withdraw your complaint." They can't. Rule 15(h) of the Rules of Disciplinary Procedure.

"I'll give you money to settle your claims against me." You probably can't and maybe shouldn't. Rule 1.8(h)(2) of the Delaware Lawyers Rules of Professional Conduct.

### 4. Depression, Reflection and Loneliness

Attorneys often become obsessively and negatively focused on their disciplinary matter. This is especially true when they fail to disclose the matter to their spouses or law partners/employers. While disciplinary matters are confidential, you are not precluded from consulting with counsel or receiving confidential help from the Lawyer's Assistance Program. Rule 8.3(d) of the Delaware Rules of Professional Conduct.

### 5. Upward Turn

The fear of the unknown can start to ease after the disciplinary investigation ends and a petition is filed. While the outcome may still be uncertain, the "worst case scenario" can usually be predicted by reviewing the typical discipline imposed in prior, similar matters.

### 6. Reconstruction

Attorneys can and should use the time from complaint to resolution by beginning or completing remedial measures regardless of the outcome of the matter.

### 7. Acceptance and Hope

Discipline happens. Unless the discipline is disbarment, it rarely ends careers.

## How to Become a Disciplinary Statistic

1. **Panic**—Don't. Most disciplinary complaints are dismissed at the initial Evaluation stage.

2. **Fail to respond to the ODC's evaluation or investigation of the complaint.** It won't go away and a failure to respond is a new violation. Rule 8.1(b) of the Delaware Professional Conduct Rules.

3-A. **Represent yourself. (*Disclaimer- I do disciplinary defense)** Check your malpractice policy. It probably provides disciplinary defense coverage.

**OR**

3-B. **Represent yourself in ways that you would never represent a client.** (e.g. respond to ODC without reviewing the facts or familiarizing yourself with the Professional Conduct Rules, the Rules of Disciplinary Procedure and the applicable case law).

4. **Respond with the aforementioned anger and resentment that you received a complaint and that you have to respond.** A copy of your response will usually be sent to the complainant for comment so you may not have the last word.

5. **Respond to a complaint with excessive and unnecessary disclosure of client confidences.** Know the limits of the exception to Rule 1.6(b)(5) (duty not to reveal confidential information).

6. **Counterattack.** Moving to disqualify Disciplinary Counsel is unlikely to be successful and even less likely to assist your defense. You do not have a right to have the Investigator/Prosecutor like you. No, it is not a conflict if ODC has concluded that you've violated a Professional Conduct Rule.

I hope you never need these lists, but I also hope they help if you do.

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**Just Say "No": Clients To Avoid Out of Self-Preservation**

**By: Charles J. Slanina**

I recognize that we are all importuned to make legal services available to all. From time to time, the ABA kicks around the idea of mandatory *pro bono* requirements. Those who donate their time to Delaware Volunteer Legal Services are laudable. However, there comes a time when it may not be in your own best interest to take on a client. I now have over twenty years of practice in the private and public sectors, as plaintiffs' and defense counsel. Based on my own experiences and unfortunately, the sad stories told to me in the course of doing disciplinary defense, I have compiled a profile of clients to avoid. While "profiling" may not be politically correct, it may just save your skin.

1. **Clients who have had multiple prior counsel.** - You should always ask whether your potential client has interviewed or discharged prior counsel. If so, it may be an act of hubris on your part to think your experiences with this prospective client are going to be any different. At the very least, obtain permission to call the previous counsel to find out what the problems or issues in their relationship were and why it ended.
2. **Clients who visit you on the eve of the statute of limitations.** - Ask yourself why the would-be client waited. Can you be certain that you have all the necessary and correct information and parties? If not, the prospective client may be looking for a fall-back position to be able to sue

you if his underlying cause of action later proves to be unsuccessful.

3. **Clients with unrealistic expectations as to timing or results.** - Clients who tell you that they think their case is worth a million dollars or seem overly anxious about the length of time before relief or recovery are not likely to become less anxious as the litigation drags on. Neither will they be satisfied by a reasonable or appropriate settlement if you are not able to dissuade them from their unrealistic expectations.

   All plaintiff's attorneys face a Hobson's choice with regard to the initial interview. If you are not enthusiastic about the merits or the outcome of the case, the client may go elsewhere. On the other hand, if you dangle too large a number in front of the client in order to get them to sign a fee agreement, you may well be stuck with that number for the rest of the attorney-client relationship. It has been my experience that telling a prospective client that their case would be worth a million dollars if their damages were greater, liability were clearer and they were not contributory negligent, results in the client leaving the appointment with the impression that they were told that they have a million dollar case.

4. **Clients who are only interested in the "principle".** - We have all met this client. They don't care how much it costs or how long it takes because there is principle at stake. These are the clients for whom "money is no object". They don't care what it costs because they are not going to pay

you. This high-minded approach to litigation usually does not survive the first bill. Also, do you want to have the litigation directed by someone who is seeking relief which the Justice system is ill-prepared to provide? Like it or not, our system generally addresses legal issues by awarding money. Don't become a tool for someone bent on spite or revenge.

5. **Clients with negative or hostile opinions of attorneys.** - If the prospective client starts out by saying that he or she knows that all attorneys are thieves and crooks, don't expect to be viewed as the exception. Any setback or unfavorable outcome will fuel their belief that they were betrayed by someone that they did not respect from the beginning of the relationship.

6. **Clients who are victims of "conspiracies".** - Unless your college or post-graduate minor was in psychology and you feel confident that you can weed out people with underlying mental health issues, I wish you luck in persuading this client that any negative turn in the case is not the result of another monolithic conspiracy involving judges, attorneys, the opposing party and anyone else remotely involved in the case.

7. **Finally, the client who comes to your office with a big brown bag (or box) filled with file materials.** - While this prospective client may share some of the same traits with the client who fears conspiracies, this client has quite likely shopped his file around town. He or she may be obsessed by the case and outcome. They will always feel that they know the case and

what is needed better than you. Inevitably you will be accused of losing one or more of the mystery items which the prospective client is yearning to pull out of that big brown bag.

An electronic or mail version of the same type of client is the letter in broken English, usually from a Third World country, imploring your legal assistance (and eventually financial investment) in freeing trapped or impounded money illegally or immorally kept from them by a corrupt government for which they will provide you a ridiculously generous share.

Have faith that a day with no clients may be better then the day that you took on the nightmare client.

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## SHOWING GOOD FORM

**By: Charles Slanina, Esquire**

Develop and use good form letters as a preventative prescription against malpractice and disciplinary complaints. Failure to communicate is still one of the most frequent disciplinary complaints. A file documented by regular correspondence to the client is the best defense to such claims.

I recommend that a duplicate file be provided to the client as soon as the fee agreement is signed. Ideally, the file should have the same subdivided folders as your own file including correspondence, pleadings, etc. Clients should be instructed to file the copies that you should routinely send to them. This practice can head off client complaints that they don't know what is happening with their legal matter. While you may be busy working on the case, the client may have no way of knowing or appreciating your efforts without such copies.

In addition, there are some critical junctures of legal matter that should be documented.

### NON-ENGAGEMENT LETTERS

If you decline to undertake the representation, a form letter should be sent to clients after the initial interview. It could look something like this:

*Re: Auto Accident on January 1, 1999*

*Dear Mr. Jones:*

*Thank you for the opportunity to meet with you on February 1, 1999 to discuss your automobile accident which occurred on Market Street in Wilmington. At your initial consultation, you advised me that you were charged with a Failure to Yield and, to the best of your knowledge, the other driver did not receive a ticket.*

*We also discussed your medical treatment. You brought your emergency room records with you which reflected that you were treated and released and you advised me that you were no longer receiving treatment for your injuries. You also provided a copy of the police report and photos of the accident damage.*

*After discussing the matter with you and reviewing your documents, I decline to undertake your representation in this matter. No further action will be taken on your behalf by me or this firm.*

*We discussed the issue of comparative negligence. I advised you that you have a right to seek another opinion from another lawyer and that you should do so immediately due to the law which sets strict time limits for such filings. All documents which you brought with you were returned to you prior to you leaving my office.*

*It was a pleasure to discuss your case with you and I hope that you keep our firm in mind for your future legal needs. Best wishes to you if you choose to pursue this matter.*

*Very truly yours,*
*Lawyer*

Such a letter provides documentary evidence that the lawyer did not promise to follow-up by performing additional legal services. Too often, as part of either a disciplinary or malpractice claim, would-be clients allege that the attorney promised to file a complaint on their behalf or gave them misinformation with regard to the value of their claim. Some attorneys argue that such a letter should contain a statement of the statue of limitations. I prefer to tell the declined clients to contact another attorney "immediately" rather than run the risk of a malpractice claim due to incorrect, albeit gratuitous, offers of legal advice or information.

Non-engagement letters also are helpful later if the declined client claims that important documents were entrusted to the attorney and not returned or that confidences were revealed during the initial consultation which could preclude the attorney from subsequent and potentially lucrative representation of a party opponent to the declined client.

## DISENGAGEMENT LETTERS

Similarly, a form letter should be sent to clients at the conclusion of the legal matter. It should include the following:

*RE: Auto Accident on January 1, 1999*

*Dear Client:*

*It has been a pleasure to represent you in this matter. Since this matter has been successfully concluded, no further action will be taken on your behalf without a specific request to do so.*

*You have been provided a copy of or an original of all of the case documents and we are closing our file regarding this matter. That file may be destroyed in a confidential matter as we routinely purge our records.*

*If we can be of any assistance to you in future legal matters, please feel free to call upon us.*

*Very truly yours,*
*Lawyer*

Such letters prevent claims from clients that the attorney kept but failed to preserve important documents (See Rule 1.15(a) Failure to safeguard property) or that the attorney promised to do additional, and sometimes unrelated, legal work after the conclusion of the case. This matter can also permit file purges without the necessity of tracking down ex-clients years later to return their files.

## FEE AGREEMENTS

Due to the recent changes to Rule 1.5(f) you should immediately review your fee agreements to ensure that it contains language similar to the following:

*You will be billed based on my $125.00 hourly rate. This rate may increase one year after the signing of this agreement. A $2,000.00 retainer is required. Once the retainer is depleted, you will be billed monthly.*

*This retainer is refundable if it is not earned. Fees shall be considered to have been earned when the legal services are performed pursuant to the hourly rate schedule listed above. A statement of the fees earned will be provided to you at the time such funds are withdrawn from the trust account.*

## STATUS REPORTS

Monthly status reports and regular communication foster good will with clients and also forces the attorney to conduct regular reviews of the file.

*RE: Auto Accident of January 1, 1999*

*Dear Client:*

*As you know, I obtained copies of your medical records from all treating physicians and the hospital. We have also obtained a copy of the police report. The complaint was filed in the Superior Court. The defendant filed the answer and counter-claims which were forwarded to you. The attorney for the defendant and I will be exchanging information prior to the Arbitration which is scheduled for July 1, 1999. We will meet before that date to prepare your testimony. It is important that you provide the additional information I requested as soon as possible.*

*Very truly yours,*
*Lawyer*

This letter can be tickled on a monthly basis and reviewed to determine what, if any, action has been taken or what event has occurred since the last letter. The letter can be modified or updated to include the new entries to form an ongoing diary of the case.

## EDUCATIONAL PAMPHLETS

I recommend that you obtain and use forms or pamphlets describing what happens at a deposition, independent medical examination, arbitration, etc. Your malpractice carrier or ABA Section may have such pamphlets available for your area of practice. While you will certainly describe these events to the client, a cover letter forwarding this preprinted information to the client can rebut a subsequent claim that the client was not informed or prepared. Videotapes with the same information are available and may be useful with clients who are less comfortable with written information. However, document the clients' attendance at such screenings.

## SETTLEMENT OFFERS

This is a frequent source of malpractice and disciplinary claims. Unsuccessful litigants may claim that they would have settled if they had known of an offer. Offers verbally communicated to the client should be memorialized by form letter as soon as possible.

*RE: Auto Accident of January 1, 1999*

*Dear Client:*

*As we discussed on June 1, 1999, the defendants have offered to settle this matter for $15,000.00. This is an increase of $5,000.00 from their last offer of $10,000.00 on February 1, 1999.*

*Per your instructions, I have made a counter-offer of settlement of $20,000.00 which is a reduction from our original $25,000.00 demand by letter of January 15, 1999.*

*Although you have informed me that you will not accept less than $20,000.00 to settle this matter, I am obligated to bring any offer of settlement made by the defendants to your attention. As we have discussed, all such offers of settlement will be subject to a deduction of costs and attorney fees pursuant to the fee agreement.*

*Please feel free to call if you have any questions.*

*Very truly yours,*
*Lawyer*

## DISBURSEMENT STATEMENT

Use a disbursement statement. Consider inclusion of the following language:

*The above figures are approved. The undersigned acknowledges a copy of this distribution sheet and agrees to be responsible for all other expenses incurred other than show above. We further present any claims against any insurance company or individual as a result of this incident, and this case is now closed.*

## RELEASES

Caution! Releases are an exception to the rule on the use of form letters when the attorney or the firm is a party. Be wary of the prohibition contained in Rule 1.8(h) against limiting or settling malpractice claims. Make sure that your form release does not violate this Rule.

## LETTERS OF PROTECTION

See In Re: "Ethically Speaking" (November 1994).

## CONCLUSION

The use of form letters is much more than a labor saving device. They are essential tools for the management of a law practice. In addition to saving you labor, it can save you from a

malpractice claim or disciplinary complaint.

* Past "Ethically Speaking" columns are available on line at **www.dsba.org.**

***"Ethically Speaking" is intended to stimulate awareness of ethical issues. It is not intended as legal advice nor does it necessarily represent the opinion of the Delaware State Bar Association.*

## Establishing the Attorney-Client Relationship

- Appointment Confirmation Letter
- Engagement Letter
- Conflict Memo
- Fee Agreements
- "Fee Splitting" Agreements

## Maintaining the Attorney-Client Relationship

- Tracking Statutes of Limitations
- Attorney-Client Communications
- Billing
- Instructions for Depositions, IME's, Trial Testimony
- Recording/Logging calls and messages

## Terminating the Attorney-Client Relationship

- Final Billing
- Disbursement Statement
- Disengagement Letter
- Letters of Protection
- File Retention/Destruction

DATE

Mr. Former Client
123 Maple Street
Anywhere, DE 19000

RE: Client Matter

Dear Mr. Client:

Congratulations on the conclusion of your legal matter. It has been a pleasure to serve as your legal counsel. I do not believe that anything remains to be done in this case. However, if this is not correct, please let me know immediately.

If I can be of any further assistance to you in the future in this or any other matter, please give me a call.

Best wishes in the future.

Very truly yours,

Charles Slanina
Attorney at Law

CS/tt

DATE

Mr. Non-Client
123 Maple Street
Anywhere, DE 19000

RE: Your Legal Matter

Dear Mr. Non-Client:

It was a pleasure to meet you on January 1, 1900. On that date, we discussed your landlord-tenant problems at 123 Maple Street. I reviewed, but did not copy or keep, your lease and correspondence from your landlord.

Although I did not agree to represent you in this matter, I advised you that the Statute of Limitations for bringing this action will expire on January 1, 1996, but that you should immediately seek other counsel. Since no attorney-client relationship was established, I will not be performing any legal services for you in this matter.

If I can be of any assistance to you in any other legal matter in the future, please feel free to call.

Very truly yours,

Charles Slanina
Attorney at Law

CS/n

# PAYMENT OF MEDICAL SERVICE COSTS

I, _____, hereby direct and authorize _____ and the law firm of _____, to pay all fees for medical services including laboratory bills, medical report fees, appearance fees and other costs out of any recovery or settlement of my matter.

I, understand that I am fully responsible for all medical bills, witness fees and administrative charges or other costs incurred on my behalf whether or not there is a recovery through litigation or settlement or if the costs are not covered by insurance. Neither the attorney nor the law firm shall have any responsibilities with regard to those costs and expenses.

I direct you, as my attorney, to contact _____ at the time of settlement of my claim to notify them of the recovery and to obtain a statement of my accounts. In addition, I agree that no distribution of monies will be made to me until such time as my undisputed medical bills and costs have been paid.

I hereby agree that the above listed instructions are irrevocable and that a copy of this Agreement will be provided to the provider listed herein if required to receive continued treatment or other services.

A copy of this authorization shall have the same force and effect as the original.

The undersigned attorney for the above patient agrees to observe these terms and to withhold such sums from any settlement, judgment or verdict as may be necessary to adequately protect the interests of the service provider. If there is a dispute concerning these costs, the attorney agrees to hold adequate sums of monies in an escrow account until a resolution has been made between the medical service provider and my client.

| _____ | _____ | _____ |
|---|---|---|
| ATTORNEY SIGNATURE | PRINTED NAME | DATE |
| _____ | _____ | _____ |
| CLIENT SIGNATURE | PRINTED NAME | DATE |

CONFLICT MEMORANDUM

TO: ALL ATTORNEYS

FROM:

DATE:

RETURN THIS MEMORANDUM PROMPTLY WHETHER OR NOT YOU ARE AWARE OF ANY CONFLICT.

PROPOSED CLIENT:_____

PRINCIPALS:_____

_____

EXPECTED ADVERSARY (IES):_____

PRINCIPALS:_____

_____

DESCRIPTION OF PROPOSED REPRESENTATION:_____

_____

_____

NO APPARENT CONFLICT: _____

APPARENT CONFLICT (EXPLAIN)_____

_____

DATE:_____ SIGNATURE:_____

Revised 1/90

# YOUR DEPOSITION

Your deposition may be taken during this case. A deposition is an important procedure, which requires preparation. The following instructions will help you understand what a deposition is, why it is being taken, how it works, how you should act, and the pitfalls to avoid.

**Predeposition Instructions:**

1. **What is a deposition?** A deposition is the testimony of a witness taken under oath before trial. Opposing counsel will ask the questions, and a court reporter will record the lawyer's questions and your answers. Your lawyer will be present, but the judge will not. In all likelihood, the deposition will take place in one of the lawyer's offices. The testimony you give at your deposition will be similar to what you will later testify to in court.

2. **The purpose of a deposition.** Opposing Counsel will take your deposition for three main reasons:

- To find out your personal knowledge of the facts and issues in the case; in other words, to know your story and what you will say in court.

- To pin you down to a specific story so that you will have to tell that same version of your story in court.

- To catch you in a lie so as to persuade the court that you are not a truthful person and therefore your testimony should not be believed on any of the points, particularly the crucial ones.

These are legitimate purposes, and opposing counsel has every right to take your deposition. Likewise, you have the same right to take the deposition of the opposing party and all witnesses.

3. **Pitfalls to avoid.** Always remember that as a litigant or a witness your only goal is to give the fact as you know them.

- Do not give opinions. Generally speaking if you are asked a questions that calls for an opinion, your attorney will object to the question. However, if your lawyer advises you to go ahead and answer after the objection, then answer.

- Never state facts that you do not know. Even if saying you don't know makes you appear ignorant or evasive, do not guess or estimate an answer. If your answer is wrong, your opponent can use it to show that you do not know what you are talking about or to imply that you are deliberately not telling the truth.

- Never try to explain or justify your answer. Doing so might make it appear that you doubt the accuracy or authenticity of your testimony.

- Only give readily available information. Do not ask your lawyer for information or ask another witness. Do not volunteer to look up anything or supplement your answer unless your lawyer tells you to.

- Do not reach into your pocketbook, wallet, or briefcase for any documents or information, unless your lawyer tells you to. Likewise, do not ask your lawyer for any document in his or her file.

- Do not get angry. This destroys the effect of your testimony and may cause you to say things that can be used against your later.

- Do not argue with the lawyer. Give the information you have--that is all opposing counsel is entitled to. Answer questions in an ordinary tone of voice. An emotional response to certain matters could give your opponent an advantage.

- If your lawyer starts to speak, stop answering immediately and allow him or her to talk. If your lawyer is objecting to the questions, do not speak until he or she advises you to answer or opposing counsel asks the next questions.

- Take your time. The transcript of your deposition does not show how long it takes you to answer. Think about each question and answer if in a straightforward manner.

- Tell the truth. The truth will never hurt you. Your lawyer may explain away any truth, but cannot explain away your lie or your concealment of the truth.

- Never joke in a deposition. Humor will not be apparent on the transcript and will make you look crude or cavalier about the truth.

- Do not volunteer facts. Simply answer yes or no. Do not elaborate unless asked to do so. Such information can only hinder your case.

- After the deposition, do not chat with your opponent or your opponent's lawyer. Remember, they are your legal enemies. Do not let good manners cause you to drop your guard.

- If you do not understand a questions, ask that it be rephrased or repeated.

After reading these suggestions, write down any questions you have and ask your lawyer about them before your deposition.

# SURVIVING THE PRACTICE OF LAW

by

Charles Slanina

There were two news items in the past year which neatly framed the issues of attorney mental health and wellness. By now, you have all read the articles, seen the advertisements, and attended the CLEs on the subjects of mental health and the practice of law.

Practicing law is stressful. Stress can impair an attorney's ability to practice law. Stress can lead to depression, and depression can lead to self-medication by drug and alcohol use and abuse. Professional misconduct and loss of license (or worse) may follow.

Members of the Delaware Bar are constantly reminded that the Delaware Lawyers' Assistance Program is available on a confidential basis. Whether help is sought in times of crisis or to retain (or obtain) wellness, all inquiries and assistance are confidential. The DE-LAP program, its Executive Director Carol Waldhauser, and all of the attorneys who serve in that program not only save careers but also lives. The two news items in the past year reinforce just how critical a role DE-LAP plays in both the life and health of the Bar. In the first instance, the widow of a partner in a large, national firm shared a letter entitled "Big Law Killed My Husband." The letter described how she had met her husband on the first day of law school, how they shared every class, and how they even sat next to each other for two bar exams because their last names were, by then, the same. Her husband died by suicide one month to the day before their ten-year wedding anniversary.

While she acknowledges that he struggled with binge drinking and would overindulge at social events, she blames his employment for his death. Her letter cites a series of triggering events. His mentor and confidante had recently and suddenly left. That move caused disruption in the firm, including the retirement of another of her husband's mentors. He was suddenly

placed in a position of leadership but felt that the firm failed or refused to hire lateral support. At the same time, he began working on a large and stressful litigation matter, which left him overly stressed and exhausted. (Coincidentally, the litigation was in Delaware.)

His wife was so concerned about his health that she insisted he go to an emergency room. His response was, "You know, if we go, this is the end of my career." She reached out to his colleagues to inquire whether they had observed changes in his behavior and to ask them to keep an eye on her husband. She was advised that her husband seemed to have lost his sense of humor and that he spent most of his time working with his door closed. She found out later that he had stopped responding to work emails. She also discovered that instead of going into work as he told her he would, he spent the day at his father's grave—a man he never met—a couple of hours away from their home.

She urged him to quit. He told her that he couldn't quit in the middle of a case, an irony not lost on her. He found it easier to kill himself than to walk away from his clients and career.

One morning, in the midst of this terrible period, he advised her that he received an email which required him to go into the office briefly. She offered to go and sit with him as he worked. She also offered to pack him a sandwich. He declined both. Instead, he left the house with his gun, which he used to kill himself in his office parking garage.

Her letter is difficult reading, and I have opted not to use names or to identify the firm. As a 41-year-old widow, she is understandably distraught. As the title of her letter suggests, she believes that her husband was overworked, underappreciated and inadequately supported. She notes that the firm quickly assembled a memorial service for her husband, which was attended mostly by staff and only a few attorneys.

She acknowledges that there aren't any magic solutions to these problems, but she urges

change nonetheless. Despite the letter's title, she also acknowledges that "Big Law" didn't directly kill her husband. She knows that he suffered from a deep, hereditary mental health issue and that he lacked essential coping mechanisms. But she argues that a high-pressure career in a culture where it is shameful to ask for help created the perfect storm that led to his demise.

The second, and brighter, note that was struck was a much different story, self-told by Mark Goldstein, an attorney at Reed Smith. In July of this year, Mr. Goldstein posted his own story of "coming out" to his firm that he had mental health issues, specifically severe depression, obsessive-compulsive disorder and anxiety. He did so with the understandable trepidation as to how his firm would react. Both he, as well as every other reader of his message, should be heartened to hear that his disclosure changed his life—for the better. Not only was his firm supportive, he was inundated with messages of compassion from his colleagues and staff. With his permission, the firm's website addressed the situation, highlighting the critical need for awareness of attorney mental health. He was contacted by dozens of clients, in-house counsel, human resource professionals, and others with both encouragement and requests for public speaking engagements.

In addition to the shameless, but wholly deserved, plug for DE-LAP, there are multiple resources available. Check out LawyersWithDepression.com, run by Dan Lukasik, the Director of Workplace Well-Being for the Mental Health Association of Buffalo, New York. Lukasik offers ten milestones for lawyer burnout:

- Over-commitment
- Inadequate breaks and rest (continuous client involvement)
- Idealistic standards
- Constant, low-grade stress (occasionally interrupted by crisis)

- Lack of help and assistance
- Chronic fatigue ("hitting the wall")
- Strong sense of responsibility
- Guilty feelings about missing church events/family and social activities
- Heavy job and family responsibilities/expectations
- Inability (or strong reluctance) to say "No"

You might also want to check out the blog of Will Meyerhoffer (www.thepeoplestherapist.com). Dr. Meyerhoffer is a lawyer-turned-psychotherapist who deals with the threats of burnout and stress for attorneys: killer competition; time and billing demands; client expectations; and the prevalence of type-A perfectionism in the profession.

But don't forget www.de-lap.org.

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** *"Ethically Speaking" is available online. The columns of approximately the past two years are available on www.dsba.org.*

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